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Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-6248

JACQUELYN E. HUNTER,

Petitioner,

v.

GERALD WALLACE DEAN, SHERIFF,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
QUESTIONS PRESENTED	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	
I. The Georgia Statutory Framework: A Brief Overview	6
II. The Economically Disadvantaged Defendant And The Criminal Justice System: Not Every Difference In Treatment, Perceived Or Real, Should Always Make The Economically Disadvantaged A Suspect Class For Purposes Of Equal Protection Analysis	9
A. From "Rational Basis" to "Strict Scrutiny"	9
B. "Suspect Class" and the Criminal Justice System	11
1. Effective Access to Review	13
2. Indigency, Cost Recoupment, and Fines	15
C. Conclusion	17

TABLE OF CONTENTS—Continued

Page

III. The Financial Resources Available To A Defendant Is One Relevant Factor In Ascertaining Whether He Is A Good Risk For Probation. Permitting A Trial Judge To Weigh This Factor In Determining Whether Probation Would Be Appropriate, And On What Conditions, Furthers The Broad Sentencing Discretion Necessary For An Effective Criminal Justice System And Further Aids The Efficacy Of A Probation System Which, To Be Fully Effective, Must Have A Broad Base Of Public Support..... 19

A. The Sentencing Function..... 19

B. Crime and Economic Disadvantage..... 20

C. Public Perception..... 25

D. Conclusion..... 27

CONCLUSION..... 28

TABLE OF AUTHORITIES

Cases:

Burns v. Ohio, 360 U.S. 252 (1959)..... 13

Dandridge v. Williams, 397 U.S. 471 (1970)..... 10

Douglas v. California, 372 U.S. 353 (1963).....6, 14

Draper v. Washington, 372 U.S. 487 (1963)..... 14

England v. Newton, 238 Ga. 534, 233 S.E. 2d 787 (1977)..... 8

Fuller v. Oregon, 417 U.S. 40 (1974)..... 16

TABLE OF AUTHORITIES—Continued

Cases—Continued:

	Page
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	18
Graham v. Richardson, 403 U.S. 365 (1971)	10
Gregg v. Georgia, 428 U.S. 153 (1976)	26
Griffin v. Illinois, 351 U.S. 12 (1956)	*passim*
Griffiths, In Re, 413 U.S. 717 (1973)	10
Hunter v. Dean, 240 Ga. 214, 239 S.E.2d 791 (1977)	5
James v. Strange, 407 U.S. 128 (1972)	16
Korematsu v. United States, 323 U.S. 214 (1944)	10
Lane v. Brown, 372 U.S. 477 (1963)	14
Lear v. Adkins, 395 U.S. 653 (1969)	4
Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911)	10
Loving v. Virginia, 388 U.S. 1 (1967)	10
Maher v. Roe, 432 U.S. 464 (1977)	5, 10
Marshall v. United States, 414 U.S. 417 (1974)	27
Massachusetts v. Westcott, 431 U.S. 322 (1977)	4
Massachusetts Board of Retirement v. Murgia, 427 U.S. 207 (1976)	10
McGowan v. Maryland, 366 U.S. 420 (1961)	5, 10
McLaughlin v. Florida, 379 U.S. 184 (1964)	5, 10
Meachum v. Fano, 427 U.S. 215 (1976)	18
Mempa v. Rhay, 389 U.S. 128 (1967)	18
Morris v. Schoonfield, 399 U.S. 508 (1970)	16

TABLE OF AUTHORITIES—Continued

Cases—Continued:

	Page
Morrissey v. Brewer, 408 U.S. 471 (1972)	18
Ortwein v. Schwab, 410 U.S. 656 (1973)	11
Rinaldi v. Yeager, 384 U.S. 305 (1966)	6, 15
Roberts v. Louisiana, 428 U.S. 325 (1976)	26
Ross v. Moffitt, 417 U.S. 600 (1974)	12, 14
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973)	*passim*
Schlib v. Kuebel, 404 U.S. 357 (1971)	10
Scott v. Kentucky Parole Board, 429 U.S. 60 (1976)	18
Smith v. Bennett, 365 U.S. 708 (1961)	13
Tate v. Short, 401 U.S. 395 (1971)	*passim*
United States v. Kras, 409 U.S. 434 (1973)	11
Williams v. Illinois, 399 U.S. 235 (1970)	*passim*
Williams v. New York, 337 U.S. 241 (1949)	19, 25
Williamson v. Lee Optical Co., 348 U.S. 483 (1955)	10

Statutory Authority:

Ark. Stat. Ann. §43-2331 (1977 Repl.)	8
Ga. Code Ann. §24-2823 (1976 Rev.)	23
Ga. Code Ann. §26-1601 (1977 Rev.)	27
Ga. Code Ann. §26-1902(a), (b) (1977 Rev.)	26
Ga. Code Ann. §27-2502 (1978 Rev.)	7
Ga. Code Ann. §27-2511.1 (1978 Rev.)	25

TABLE OF AUTHORITIES—Continued

Statutory Authority—Continued:

	Page
Ga. Code Ann. §27-2529 (1978 Rev.)	2, 7, 9, 23, 27
Ga. Code Ann. §§27-2702 *et seq.* (1978 Rev.)	7
Ga Code. Ann. §27-2709 (1978 Rev.)	2, 7, 9, 24, 27
Ga. Code Ann. §27-2712 (1978 Rev.)	8
Ga. Code Ann. §27-2713 (1978 Rev.)	8, 22
Ga. Code Ann. §27-2727 (1978 Rev.)	4
Ga. Code Ann. §27-2901 (1978 Rev.)	3, 8, 9, 27
Ill. Ann. Stat. c. 38 §1005-6-3.1 (Supp. 1978)	8
Mich. Stat. Ann. §28.1075 (Supp. 1978-1979)	8
N.Y. Penal Law Arts. 410, 420 (1971)	8
Vernon's Tex. Stat. Ann. Art. 42.12 (Supp. 1977)	8

Other Authority:

ABA STANDARDS, Sentencing Alternatives and Procedures, Introduction (1968)	19

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OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 240 Ga. 214, 239 S.E. 2d 791 (1977).

QUESTIONS PRESENTED

1.

In cases arising in the criminal justice system, should wealth be a suspect classification for purposes of equal protection analysis?

2.

Consistent with the Equal Protection Clause of the Fourteenth Amendment, may a trial judge ever consider the financial resources of the defendant in ascertaining whether the defendant is a good risk for probation?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

It also involves the following provisions of state law (unofficially codified as):

> *Ga. Code Ann. §27-2529 (1978 Rev.): Payment of fine as condition precedent to probation in felony cases; effect of revocation of probation*
>
> In any case where the judge may, by any law so authorizing, place on probation any person convicted of a felony, such judge may in his discretion fine such person so convicted not more than $2000 as a condition to such probation: Provided, such defendant shall not be entitled to any rebate or refund of any part of such fine so paid, in any case such probation shall be revoked by law.
>
> *Ga. Code Ann. §27-2709 (1978 Rev.): [Statewide Probation Act]; jurisdiction of courts; procedure; hearings; reference to circuit probation supervisor; period of probation; disposition of prisoner pending hearing; payment of fines or costs as condition precedent to probation*
>
> * * * *
>
> If it appears to [the] court upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon such defendant but may stay

and suspend the execution of such sentence or any portion thereof, and may place him upon probation under the supervision and control of the circuit probation supervisor for the duration of such probation.

* * * *

The court may, in its discretion, require the payment of a fine or costs or both as a condition precedent to probation.

Ga. Code Ann. §27-2901 (1978 Rev.): Time of payment of fines

Every fine imposed by the court under the authority of this Code shall be paid immediately or within such reasonable time as the court may grant.

STATEMENT OF THE CASE

The petitioner, Jacquelyn Hunter, and Eugene Thomas were indicted by the grand jury of Terrell County, Georgia, for burglary. (App. 2). Upon arraignment, both defendants entered pleas of guilty to the charge; both were represented by counsel appointed by the trial court.

Before imposing sentence, the trial court inquired about the financial resources of each defendant. Specially, the court inquired as to whether the defendants could pay a fine and how the fine could be paid. The petitioner replied that her cousin, Miss Fannie Richardson, and Mrs. Richardson would pay a fine. (App. 3).[1]

[1] Neither Mr. Bonner, present counsel for the petitioner, nor the Attorney General represented the respective parties when the petitioner sought habeas corpus relief in the Superior Court of Terrell County. Apparently the transcripts of the earlier arraignment proceedings and the petitioner's pleas of guilty were not made part of the habeas record. It is likely, however, that the habeas judge took judicial notice of the earlier proceedings because the habeas action followed sentencing by a matter of only a few weeks and the habeas judge was the sentencing judge.

Earlier, the petitioner had informed the court that she did not work. (Arraignment Tx. 3).

The petitioner and her codefendant were thereafter sentenced to two years imprisonment;[3] the sentences of imprisonment were probated, conditioned upon payment of a fine of $165, payment of one-half of the court costs, and payment of a modest attorney fee.[3] (App. 4). For reasons that remain unexplained, the petitioner's fine was not paid and she was incarcerated.

After incarceration, the petitioner sought habeas corpus relief in the Superior Court of Terrell County. She averred that she had been unable to pay the fine and that incarceration for an inability to pay was "violative of due process and equal protection of the law." (App. 5). The habeas court, which was also the sentencing court, struck that portion of the sentence requiring the payment of an attorney fee but otherwise upheld the validity of the sentence.[4] (App. 6).

The transcripts are apparently now a part of the record even though they were not before the Supreme Court of Georgia. The respondent does not object to the inclusion of the transcripts in the present record because: (1) the facts relied on by the petitioner in the Supreme Court of Georgia were not disputed and (2) the decision of the Supreme Court of Georgia states the essential facts. *Cf. Lear v. Adkins*, 395 U.S. 653, 657 n.1 (1969); *see Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977).

[2] The petitioner states she is a first offender. Brief of Petitioner, 3. While she was eligible for sentencing under Georgia's so-called First Offender Act, *see* Ga. Code Ann. § 27-2727 (1978 Rev.), the petitioner has a juvenile record stemming from a drug charge. (Plea Tx. 4-5). "First offender" for purposes of § 27-2727 means only that the defendant has not previously been convicted of a felony.

[3] The petitioner was not incarcerated prior to arraignment. She appeared without counsel although she explained to the trial court that "in a way" she was "able to hire a lawyer." The court then appointed counsel to represent her. (Arraignment Tx. 3, 5).

[4] The petitioner states that she sought a modification of her sentence so that she could pay the fine in installments. Brief of Peti-

The Supreme Court of Georgia affirmed the habeas court, *Hunter v. Dean*, 240 Ga. 214, 239 S.E. 2d 791 (1977), and this Court granted certiorari. ___ U.S. ___ (1978).

SUMMARY OF ARGUMENT

A threshold inquiry that must be made in this equal protection case, arising in the criminal justice system, is whether the economically disadvantaged are a "suspect" class. The inquiry is necessary because if wealth is "suspect," a standard of strict judicial scrutiny is employed; if wealth is not a suspect classification, the state action in question will pass constitutional muster if it is rationally related to the achievement of legitimate state policy. *Compare McLaughlin v. Florida*, 379 U.S. 184 (1964) *with McGowan v. Maryland*, 366 U.S. 420 (1961).

Although financial need has never been labeled "suspect" in cases that do not originate in the criminal justice system, it has been inferred that perhaps different considerations apply in that area of the law. *Maher v. Roe*, 432 U.S. 464, 471 n.6 (1977). However, the reasons why financial need should not identify a suspect class for equal protection purposes are just as persuasive in cases arising in the criminal justice system. More importantly, when the equal protection cases having their origin in the criminal law are closely examined, it appears that the traditional test of rationality has been employed in cases that may be broadly grouped as follows: effective access to

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tioner, 4. The prayer of the habeas petition (omitted in the appendix) was for "discharge" and "such other relief as the court shall deem . . . proper." While a modification to permit installment payments may have been within the scope of the later prayer, the petitioner did not aver that she was able to pay her fine on an installment basis. On appeal, she did suggest installment payments as an accommodation to the financially disadvantaged.

review, *e.g.*, *Griffin v. Illinois*, 351 U.S. 12 (1956), *Douglas v. California*, 372 U.S. 353 (1963); cost recoupment, *e.g.*, *Rinaldi v. Yeager*, 384 U.S. 305 (1966), and fines, *e.g.*, *Williams v. Illinois*, 399 U.S. 235 (1970).

The same analysis should be applied *sub judice*.

When the sentence in this case is subjected to the test of whether the classification drawn—admittedly made through the exercise of individualized sentencing discretion—is rationally related to the achievement of permissible state policy, it is not offensive to the Equal Protection Clause. The financial resources available to a defendant is one relevant factor in ascertaining whether he is a good risk for probation. While it may be a minor, or nonexistent, factor in many cases, in many others it is important to the sentencing judge as he ponders sentencing alternatives. Permitting a trial judge in an appropriate case to weigh this factor in determining whether a sentence should be probated, and on what conditions, furthers at least two important state interests: (1) the broad sentencing discretion necessary for an effective criminal justice system which in turn (2) aids the efficacy of a criminal justice subsystem—probation—which to be fully effective, must have a broad base of public support.

ARGUMENT

I. The Georgia Statutory Framework: A Brief Overview.

Before extensive discussion of the important constitutional issues presented by this case, a review of the applicable statutes will facilitate an understanding of the context in which the issues arise.

Probation in Georgia is comprehensively governed by

the Statewide Probation Act. Ga. Laws 1956, pp. 27-36, as amended [Ga. Code Ann. §§27-2702 et seq. (1978 Rev.)]. The basic provision of the act permits the sentencing court to "hear and determine the question of . . . probation" after the defendant has been found guilty pursuant to verdict or plea. Ga. Code Ann. §27-2709 (1978 Rev.). Prior to hearing the Court may refer the case to the probation supervisor of the circuit for a pre-sentence investigation, report, and recommendation. *Id.* The act further provides:

> If it appears to the Court upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon such defendant but may stay and suspend the execution of such sentence or any portion thereof, and may place him upon probation under the supervision and control of the circuit probation supervisor for the duration of such probation.
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> * * * *
>
> The court may, in its discretion, require the payment of a fine or costs or both as a condition precedent to probation. *Id.*

During the term of a probated sentence the sentencing court retains jurisdiction over the defendant and may rescind, revoke, or modify the sentence.[6] *Id.*

Some of the general statutory provisions pertaining to sentencing are also implicated. Ga. Code Ann. §27-2529 (1978 Rev.), like Ga. Code Ann. §27-2709 (1978 Rev.),

[6] The modification power is unique to a probated sentence. When a non-probated sentence is involved the power to change or modify ends with the expiration of the term of court at which the sentence was imposed. Ga. Code Ann. § 27-2502 (1978 Rev.).

authorizes the sentencing court to impose a fine as a condition of probation. Under §27-2529, a fine cannot exceed $2000. Upon the revocation of probation, §27-2529 also provides that the defendant shall not be entitled to a rebate or refund of the fine that he has paid.

Finally, fines imposed by a court are to be paid immediately or the court may permit the fine to be paid "within [a] reasonable time." Ga. Code Ann. §27-2901 (1978 Rev.).

The petitioner concedes the validity of these statutes, Brief of Petitioner, p. 17; her contention is that a trial judge cannot evade the command of the Equal Protection Clause in applying them. *Id.* at 16-20. Recognizing that "her exclusion [from probation] was the result of an individual exercise of sentencing discretion," the petitioner nevertheless seeks to equate her conditionally probated sentence with the legislatively mandated judgments which framed the issues in *Williams v. Illinois*, 399 U.S. 235 (1970), and *Tate v. Short*, 401 U.S. 395 (1971). Brief of Petitioner, p. 5, 16-17.

While we agree with the petitioner that a state may not accomplish indirectly through its judiciary what it may not accomplish directly, that observation is only the beginning of the inquiry; judicial action is obviously not above equal protection scrutiny. But with a concededly valid statutory scheme[6] and the admitted presence of

[6] The Georgia statutes are not totally unlike the statutes found in other jurisdictions. *See, e.g.*, Ark. Stat. Ann. § 43-2331 (1977 Repl.); Ill. Ann. Stat. c.38 § 1005-6-3.1 (Supp. 1978); Mich. Stat. Ann. § 28.1075 (Supp. 1978-1979); N.Y. Penal Law Arts. 410, 420 (1971); 18 U.S.C. § 3651; Vernon's Tex. Stat. Ann. Art. 42.12 (Supp. 1977).

The applicable Georgia statutes also provide for early termination, Ga. Code Ann. § 27-2712 (1978 Rev.), but unlike many systems no apparent provision is made for an extension of the period of probation. *Cf.* Ga. Code Ann. § 27-2713 (1978 Rev.); *see England v. Newton*, 238 Ga. 534, 233 S.E. 2d 787 (1977). Furthermore, when probation

individualized sentencing discretion, the equal protection issue presented by the facts herein is not as simple as analogizing to a statute that mandates the prepayment of a fine as a condition precedent to probation and citing a litany of cases holding that sentencing discretion has recognized limits.

With the statutory framework thus established, we turn to the equal protection issue. We will consider whether the economic status of the defendant is a factor that a trial judge may ever consider as he exercises his discretionary powers in fashioning an appropriate sentence. After demonstrating that consideration of economic status reflects a healthy sense of realism and should not be branded "suspect," we will conclude with a discussion of why the application of Ga. Code Ann. §§ 27-2529, 27-2709, 27-2901 (1978 Rev.) in this case rationally furthers legitimate state interests—maintaining the broad sentencing discretion of trial judges necessary for an effective criminal justice system and assuring the efficacy of a probation system that permits convicted felons to satisfy their obligation to the state outside the confines of the penitentiary.

II. The Economically Disadvantaged Defendant And The Criminal Justice System: Not Every Difference In Treatment, Perceived Or Real, Should Always Make The Economically Disadvantaged A Suspect Class For Purposes Of Equal Protection Analysis.

A. From "Rational Basis" to "Strict Scrutiny"

The Equal Protection Clause has always been thought

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is revoked the defendant receives sentence credit for the time he has been on probation. Ga. Code Ann. § 27-2712, *supra*.

to permit differences in treatment, even with some resulting inequality, if the object of the state action can be rationally justified. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). Absent invidious discrimination, a rationally based classification does not run afoul of the Clause. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 207 (1976); *Schlib v. Kuebel*, 404 U.S. 357, 364 (1971); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

Certain classifications, however, have come to be viewed as "inherently suspect." "Suspect" classifications are subject to close judicial scrutiny; they must serve some "overriding [state] purpose" and be essential and necessary, as opposed to only rationally related, to the achievement of state policy. *McLaughlin v. Florida*, 379 U.S. 184, 192-193, 196 (1964); *cf. Graham v. Richardson*, 403 U.S. 365 (1971). Classifications premised on race,[7] nationality,[8] and alienage[9] have been deemed "suspect" and thus subject to strict judicial scrutiny. On the other hand, economic disadvantage, without more, has never been deemed sufficient to identify a suspect class. *Maher v. Roe*, 432 U.S. 464, 471 (1977); *San Antonio School District v. Rodriquez*, 411 U.S. 1, 29 (1973); *Dandridge v. Williams, supra*, 397 U.S. at 484-485.

The petitioner argues, however, that financial need has effectively been branded a "suspect class" in the administration of criminal justice; she relies on *Griffin v. Illinois*, 351 U.S. 12 (1956). She draws support from *Griffin* and

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[7] *McLaughlin v. Florida, supra; Loving v. Virginia*, 388 U.S. 1, 9 (1967).

[8] *See Korematsu v. United States*, 323 U.S. 214, 216 (1944).

[9] *In Re Griffiths*, 413 U.S. 717 (1973); *Graham v. Richardson, supra.*

its progeny and the Court's recognition that "the principles underlying *Griffin* . . . do not extend to legislative classification generally." *Maher v. Roe, supra,* 432 U.S. at 471 n.6.

B. "Suspect Class" and the Criminal Justice System

Should *Griffin* control the "suspect class" issue? The petitioner assumes that it already does; we submit that *Griffin* does not, and should not, control this issue.

The reality underlying cases such as *Maher v. Roe, supra,* and *San Antonio School District v. Rodriquez, supra,* must be that the poor suffer greater economic hardship than the more affluent. This economic reality manifests itself in many ways, private and public. Stated in another fashion, the economically disadvantaged may face an imposing barrier between them and the lifestyle to which they aspire. In the public sector, governmental regulation may sometimes pose an obstacle to the economically disadvantaged who seek to avail themselves of a benefit or service for which the more affluent can easily pay. Yet, consistent with the Equal Protection Clause, prepayment of fees can be exacted from *all* who seek to petition for bankruptcy[10] or appeal to a higher court in a civil case.[11] Just as consistently, a state need not fund abortions for indigent women simply because childbirth is funded, *Maher v. Roe, supra;* nor must a state, in financing its educational system, require precisely equal per pupil expenditures between affluent and less affluent school districts. *San Antonio School District v. Rodriquez, supra.*

The petitioner correctly notes that the decisions discussed above arose in the milieu of "economics and social

[10] *United States v. Kras,* 409 U.S. 434 (1973).

[11] *Ortwein v. Schwab,* 410 U.S. 656 (1973).

welfare," *United States v. Kras*, 409 U.S. 434, 446 (1973), and stresses that this case involves the administration of criminal justice. Nevertheless, the reality discussed above —that the poor necessarily suffer greater economic hardship than the more affluent—is just as apparent in the criminal justice system. As observed by Mr. Justice Frankfurter:

> A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion. *Griffin v. Illinois*, *supra*, 351 U.S. at 23 (Frankfurter, J., concurring).

Just as in the cases arising in the social welfare-economic area where "the Equal Protection Clause does not require absolute equality or precisely equal advantages," *San Antonio Independent School District v. Rodriquez*, *supra*, 411 U.S. at 24, so too in the criminal justice context, a state need not "duplicate the legal arsenal that may be privately retained by a criminal defendant. . . ." *Ross v. Moffitt*, 417 U.S. 600, 616 (1974).

The Court, however, is far from insensitive to the plight of the economically disadvantaged; numerous decisions subsequent to *Griffin* attest to the Court's allegiance to the precept of equal justice and effort to ameliorate the impact of poverty on the criminal justice system. In many of the decisions the focus of the Court is unclear; some decisions are based solely on equal protection concepts and some are based on a combination of equal protection and due process concepts. But in none of the cases implicating the Equal Protection Clause have the indigent been identified as a "suspect class." Rather, a critical examination of the cases reveals that state statutes and

practices placing the indigent at a disadvantage in the criminal justice process have been invalidated, at least implicitly, on the basis of irrationality. In other words, if the state action (usually statutory in origin) cannot be rationally justified, the resulting discrimination effected by the state action has been deemed "invidious" and therefore offensive under the Equal Protection Clause.

We now turn to those cases.

1. Effective Access to Review

In *Griffin v. Illinois*, 351 U.S. 12 (1956), the denial of appellate review to indigent defendants because of their inability to purchase a transcript, necessary to secure an adequate review of criminal convictions, was held to be in violation of the Due Process and Equal Protection Clauses. In terms of the equal protection issue, the *Griffin* plurality did not employ the test of strict judicial scrutiny because indigents are a suspect class; rather, they simply utilized the rational basis test. Drawing a parallel between the right of a poor person to defend himself at a trial and the right to secure adequate appellate review of a conviction, the plurality succinctly observed that "the ability to pay costs in advance bears no *rational relationship* to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial." *Id.* at 17-18 (emphasis added).

Griffin was soon relied upon to strike down a statute that required the payment of a filing fee before an indigent could seek appellate review of his conviction, *Burns v. Ohio*, 360 U.S. 252 (1959), and a similar statute requiring the payment of a filing fee before petitioning for habeas corpus relief. *Smith v. Bennett*, 365 U.S. 708 (1961). In *Smith*, the Court noted that the "gist" of *Griffin* and

Burns was the absence of a rational basis in the statutes implicitly assuming that an indigent's effort to have his case reviewed was less meritorious than the efforts of other defendants. *Smith v. Bennett, supra,* 365 U.S. at 710.

Lane v. Brown, 372 U.S. 477 (1963), and *Draper v. Washington,* 372 U.S. 487 (1963), struck down a financial barrier between an indigent and his ability to secure a transcript for an appeal of a post-conviction proceeding (*Lane*) and a procedure, from which review was effectively precluded, whereby the indigent had to make a showing that his appeal was not frivolous (*Draper*). Finally, to effectuate the adequacy of appellate review, the right to counsel was extended to indigent defendants on direct appeal. *Douglas v. California,* 372 U.S. 353 (1963).

Succinctly stated, the above cases may be read to hold that state practices and procedures which place an insuperable barrier between an indigent defendant and his ability to secure a meaningful review of his conviction—a review that is otherwise available to the affluent—are irrational and thus offensive under the Equal Protection Clause.[12] Such barriers are deemed irrational because the merit *vel non* of a defendant's appeal, motion, etc. is simply not dependent on his financial status; a wealthy defendant is just as capable of filing a frivolous appeal as an indigent defendant. More importantly, for purposes of the instant case, is the fact that indigency in and of itself has never been viewed as "suspect"; the test has

[12] Of course, the Equal Protection Clause does not decree "absolute equality," *San Antonio Independent School District v. Rodriquez,* 411 U.S. 1, 24 (1973), and a state's refusal to appoint counsel to pursue avenues of *discretionary* review does not run afoul of the Clause. *Ross v. Moffitt,* 417 U.S. 600, 611-617 (1974).

been, and should continue to be "rational basis" and not "strict judicial scrutiny."

2. Indigency, Cost Recoupment, and Fines

In other equal protection cases arising in the criminal justice system, the Court has also traditionally utilized the rational basis test and not the test of strict judicial scrutiny. Again, indigency has never been viewed as suspect so as to invoke the latter doctrine.

No doubt prompted somewhat by the additional costs incurred in providing transcripts and counsel to indigents after cases such as *Griffin v. Illinois*, *supra*, and *Douglas v. California*, *supra*, many states enacted statutes designed to recoup from the indigent the costs expended in their behalf. For instance, New Jersey enacted legislation authorizing the recoupment of transcript costs (furnished in conjunction with an unsuccessful appeal) from indigent defendants confined in the penitentiary. *See Rinaldi v. Yeager*, 384 U.S. 305 (1966). The state, however, sought recoupment only from those indigent defendants who were imprisoned; the repayment obligation was not imposed on those indigent defendants who pursued unsuccessful appeals but were sentenced to pay a fine or were given a suspended or probated sentence. *Id.* at 308. The objective of the statute was to recover from those directly benefitting from county expenditures the amount thereof; yet, as the nature of the penalty imposed—a sentence of imprisonment—"[bore] no relationship whatever to the purpose of the repayment provision," the distinction between imprisoned defendants and those who were only fined or given probated sentences was thus deemed "invidious." *Id.* at 309. Viewed as a measure to deter frivolous appeals, the statute was similarly found

lacking in rationality; the nature of the penalty is hardly a measure of frivolousness. *Id.* at 310. In short, the statute failed to pass constitutional muster because it could not be justified on a rational basis.

In a somewhat different context, a Kansas recoupment statute was found lacking in rationality. *James v. Strange*, 407 U.S. 128, 140 (1972). The primary evil of the Kansas statute was that indigent defendants, required to reimburse the state for the costs of the safeguards to which they were entitled under the Constitution, did not enjoy the protection afforded other civil debtors. The lack of customary debtor protection for only the indigent defendant smacked of "punitiveness and discrimination." *Id.* at 142. The Oregon recoupment statute was upheld for essentially the same reasons the Kansas statute was struck down; the Oregon scheme lacked the elements of punitiveness found in *James v. Strange* and the only arguable discrimination embodied in the statute—a distinction between those who are convicted and those who are not—was found to be objectively rational. *Fuller v. Oregon*, 417 U.S. 40, 47-50 (1974).

The fine cases on which the petitioner so heavily relies—*Tate v. Short*, 401 U.S. 395 (1971), *Morris v. Schoonfield*, 399 U.S. 508 (1970), and *Williams v. Illinois*, 399 U.S. 235 (1970)—also did not view indigency as necessarily suspect for purposes of equal protection analysis. The Court simply assessed the rationality of the pertinent statutory schemes in light of the objectives of the schemes.

In *Williams v. Illinois*, *supra*, the Court reviewed a statutory scheme that permitted the imprisonment of defendants for nonpayment of fines. The scheme provided a "work-off" schedule of five dollars per day. *Id.* at 236. The practical effect of the statute was to extend

the "maximum period [of confinement]" for those unable to pay their fines; the scheme was viewed as having the potential of creating one maximum penalty for the affluent and a greater maximum penalty for the poor. *Id.* at 240-241, 243. In view of the state's reliance on the collection of revenue and the obvious impairment of that interest when an indigent is incarcerated for nonpayment, *Tate v. Short*, 395 U.S. 395, 399 (1971), imprisonment of the indigent frustrates, rather than rationally furthers, the asserted interest. Mr. Justice Harlan, preferring a due process approach to the issue, also found rationality wanting. *Williams v. Illinois, supra*, 399 U.S. at 265 (Harlan, J. concurring).

More will be said of *Williams*, *Tate*, and *Morris* later, but for present purposes the point to be made is that, as in the other cases raising an equal protection issue in the context of the criminal justice system, indigency has not been viewed as suspect. The analysis employed by the Court has been, at least implicitly, the traditional test of rationality.

C. Conclusion

It is clear that economic disadvantage has not been accepted as a "suspect class" for purposes of equal protection analysis in areas of the law arising outside the administration of criminal justice. Perhaps it is because classifications drawn on the basis of economic status are easily analyzed in terms of rationality when the issue arises in the criminal justice system, but for whatever reason, economic status in itself has never been sufficient to trigger "close judicial scrutiny" in criminal cases.

The petitioner has offered no reason why economic status should be deemed "suspect" in criminal law and

related matters; she merely assumes that economic status is already suspect. The reality underlying the refusal of the Court to confer "suspect" status on economic disadvantage in other areas of the law is just as prevalent in the criminal justice system. Thus, in deciding whether the sentence imposed on the petitioner in this case is permissible under the Equal Protection Clause, the test should be the traditional one of rationality and not that of strict judicial scrutiny.[13]

We turn, therefore, to the issue of whether a trial judge may make assessments of a defendant's economic status in ascertaining whether the defendant is a good risk for conditional release, and whether permitting a trial judge to make that assessment rationally furthers a legitimate state interest.

[13] The petitioner also contends that the test of strict scrutiny should be utilized because her exclusion from probation affects a fundamental right—liberty—she enjoys under the Constitution. Brief of Petitioner, p. 6, 8.

The respondent submits that there is a distinction between the loss of conditional liberty presently enjoyed and the expectation of future conditional liberty. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and *Morrissey v. Brewer*, 408 U.S. 471 (1972), establish that the conditional liberty enjoyed by a probationer or parolee is protected by the Fourteenth Amendment. Whether the expectation of parole in the context of an application for *parole* is similarly protected has not yet been definitively resolved. *E.g.*, *Scott v. Kentucky Parole Board*, 429 U.S. 60 (1976) (remand for consideration of mootness). But if the Due Process Clause is applicable to applications for parole and whatever procedures are due, *see id.* at 62 n.4 (Stevens, J., dissenting), the convicted defendant who awaits sentencing with an expectation of conditional release already enjoys significant rights in terms of a meaningful hearing. *Cf. Mempa v. Rhay*, 389 U.S. 128 (1967).

Contrary to the petitioner's assertion that she was "awarded probation," it is clear that she was sentenced to a conditionally probated term of imprisonment and that she did not satisfy one of the conditions. Apart from the equal protection issue she is now pressing in this Court, she has never complained of her conviction (which is unrelated to the equal protection issue in any event) or sentence. Having been duly convicted on her plea of guilty, her liberty interest was extinguished. *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

III. The Financial Resources Available To A Defendant Is One Relevant Factor In Ascertaining Whether He Is A Good Risk For Probation. Permitting A Trial Judge To Weigh This Factor In Determining Whether Probation Would Be Appropriate, And On What Conditions, Furthers The Broad Sentencing Discretion Necessary For An Effective Criminal Justice System And Further Aids The Efficacy Of A Probation System Which, To Be Fully Effective, Must Have A Broad Base Of Public Support.

A. The Sentencing Function

> The consequences of a sentence are of the highest order. If too short or of the wrong type, it can deprive the law of its effectiveness and result in the premature release of a dangerous criminal. If too severe or improperly conceived, it can reinforce the criminal tendencies of the defendant and lead to a new offense by one who otherwise might not have offended so seriously again. ABA Standards, Sentencing Alternatives and Procedures, Introduction (1968).

The importance of the sentencing function cannot be overstated. It is probably accurate to say that a large segment of the public perceives the success or failure of the criminal justice system as a direct result of the exercise of the sentencing function.

The movement toward individualized sentencing was the backdrop of *Williams v. New York*, 337 U.S. 241 (1949), when the Court approved for sentencing purposes the evaluation of data pertaining to the defendant that would be inadmissible on the question of guilt or inno-

cence. That a sentencing judge should have a broad sentencing discretion has been accepted as a part of modern criminal jurisprudence.[14] *See Williams v. Illinois*, 399 U.S. 235, 243 (1970).

The petitioner does not quarrel with discretionary sentencing in general. She does feel that she was victimized by an "invidious precondition," Brief of Petitioner, p. 18, that was part of her sentence. That contention, with its attendant ramifications, must now be considered.

B. Crime and Economic Disadvantage

The petitioner is unable to perceive any relevance between economic status and "qualifications to vote or to run for public office. . . ." Brief of Petitioner, p. 13. Neither can the respondent. But the respondent is unable to agree that economic status is no more logical vis-a-vis the factors a judge may rely on in fashioning an appropriate sentence than race, religion, or alienage. *See* Brief of Petitioner, p. 19.

There is simply no rational connection between crime and race, religion, and alienage. The same cannot necessarily be said about crime and economic disadvantage. While crime and poverty are not intrinsically related—the vast majority of the economically disadvantaged are no doubt law abiding citizens—the fact that the nation's prisons and jails are teeming with those from less than affluent backgrounds is testimony enough to at least some connection between crime and poverty. The proximity to crime, frequent exposure to those who violate the law, and

[14] Perhaps because of a public perception that some of the failures of the criminal justice system must be attributable to the breadth of sentencing discretion, efforts are afoot to impose limits on that discretion. *See* Part C, *infra*.

the temptation to quickly ameliorate the financial barrier impeding attainment of a lifestyle to which some may aspire are doubtless reasons why some economically disadvantaged persons turn to crime. The more affluent resort to criminal ways also but their lessened exposure to the first two factors just noted is an indication that there is less of a connection between their financial status and why they may commit criminal acts.

Given that there is a link between crime and economic status in some cases, a sentencing judge may rightfully consider that status. *See San Antonio School District v. Rodriquez*, 411 U.S. 1, 22 (1973) (dicta). Economic status, like other "social" factors such as family history and educational achievement, is particularly (and perhaps *only*[15]) appropriate when the sentencing judge is considering a disposition that does not include incarceration in the penitentiary. Of course, in the vast majority of cases the determinative factors guiding the judge's discretion will be the nature of the crime and the past record of the defendant, and not lesser factors such as economic status. But if certain factors, thought by the trial judge to provide assurances of a successful non-penitentiary disposition, are present or absent in a particular case he would be remiss if he did not consider them.

The present case is probably illustrative of the dilemma faced by trial judges as they weigh the many factors they must consider if they are to intelligently exercise the discretion with which they have been entrusted. In this case the sentencing judge was faced with two young offenders

[15] If a sentence of imprisonment is clearly appropriate because of the nature of the crime or the record of the defendant, the financial status of the defendant should not increase or decrease the length of the sentence. The respondent would agree that there is no rational basis between the length of a sentence and financial status.

admitting that they were guilty of a serious felony, burglary. Even though the offense was serious, the age of the defendants probably prompted him to consider probation.

In considering probation, however, a trial judge should at least reach some conclusion as to whether the defendant is a good risk. A long criminal history should indicate that the defendant is a poor risk. Other factors also enter the picture. Is there any history of alcohol or drug abuse? What is the family environment? Does the defendant have a steady record of employment? The ultimate question is almost always: Can this defendant succeed on probation?

Only the defendant can assure success however. The responsibility is his in the final analysis. If a defendant and those interested in his welfare have a greater stake in ensuring success than the avoidance of imprisonment, that responsibility is heightened. Factors such as the employment of the potential probationer provides the sentencing judge with some assurance that the defendant has that added stake in success. A fine sometimes accomplishes the same purpose.

Prepayment of the full fine, as opposed to a fine on the installment plan, assures the sentencing judge that the potential probationer will have a greater responsibility in terms of conforming his conduct to the law. Consider two hypothetical similarly situated probationers, one who has prepaid his fine and the other who is paying his fine on the installment basis. Further, assume that only a relatively short period of probation is involved[16] and a temptation

[16] It could also be assumed that only a short period of service remains if, as in Georgia, Ga. Code Ann. § 27-2713 (1978 Rev.), the probationer receives sentence credit for the time on probation in the event of revocation.

to violate the terms of probation occurs. The fear of revocation and possible imprisonment in both instances acts as a curb to the temptation. If that curb is not a sufficient curb, however, the installment probationer may well violate his terms; the probationer who has prepaid his fine in full has an additional reason not to succumb to the temptation if he has a comparatively significant financial investment in his probation and will lose that investment upon revocation. *See* Ga. Code Ann. §27-2529 (1978 Rev.).

Turning again to the case before the Court, we see the presence of some of the factors discussed above. The trial court specifically inquired of the defendants if and how they could pay a fine *before* sentence was imposed. (App. 3). From this it is reasonable to infer that the judge was looking for some added assurance that the defendants would have some stake in their probation beyond avoiding revocation.

The petitioner's codefendant provided that assurance when he apprised the court that his father would pay his fine. The presence of the codefendant's father and mother with their son, and the father's confirmation that he would pay the fine,[17] no doubt convinced the trial judge of the interest of the parents in the welfare of their son and thus indicated that probation would likely be successful. The petitioner's representation that her cousin (and perhaps, aunt) would pay her fine provided the trial judge with that same assurance.[18] (App. 3).

[17] Costs were also made a condition of probation. (App. 4). The legal considerations are the same, *cf. Williams v. Illinois*, 399 U.S. 235, 239 (1970), and in this case they are de minimis in comparison even to the modest fine. *See* Ga. Code Ann. §§ 24-2727, 24-2823 (1976 Rev.).

[18] The petitioner now casts aspersions on looking to others for the payment of fines. But every trial judge knows that family concern

When the assurances that prompt a judge to impose a conditionally probated sentence do not materialize, the factors which determined the probation-worthiness of the defendant are no longer present. The judgment has already been made, however; the absence of the assuring factors renders the defendant a poor risk for probation. As the conditions embracing the reassuring factors cannot be satisfied, the probation does not become effective and the sentence must be served.[19]

In most cases the availability of financial resources to a defendant will not be a controlling factor in terms of whether he is a good risk for probation. The nature of the crime and the record of the defendant will be crucial. But in some cases, such as this one, the availability of financial resources is certainly an important factor; it is a rational factor.

The sentencing discretion vested in trial judges should not be limited. The availability of financial resources to the defendant plays an appropriate role in the exercise of that discretion. The presence or absence of economic resources will play a minor, if not nonexistent, role in many cases but in some few cases it plays an important one. Restrictions on the sentencing discretion vested in trial judges should not as a general proposition be applauded; in the context of this case, a restriction on sentencing

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and willingness to help, financially and otherwise, is an invaluable factor in the reformation of offenders. Conversely, the absence of family support can only be a negative factor in terms of whether an offender is a good risk for probation.

[19] The petitioner has not explained why her expectations were not realized. It should be noted in this connection that the Georgia procedures permit the sentencing "judge to modify or change [the] probated sentence at any time during the [term of] the . . . sentence. . . ." Ga. Code Ann. § 27-2709 (1978 Rev.).

discretion, can only serve to frustrate the state's interest in maintaining an effective criminal justice system.

The mere possibility that some judges will abuse the discretion with which they are entrusted should not be a sufficient basis to limit the discretion of all judges.[20] *Cf. Williams v. New York*, 337 U.S. 241, 251-252 (1949). The consequences of limiting that discretion are even more frightening, however. In the unusual, but sufficiently numerous, cases where the trial judge is pondering probation or imprisonment and the resources available to the defendant becomes the critical factor, he likely opts for the former alternative if he can condition probation on the actual existence of resource availability. If he cannot impose such a condition, many defendants may now find themselves incarcerated without the opportunity to demonstrate their probation-worthiness by putting up a financial stake. *Cf. Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring).

C. Public Perception

As noted earlier, it is probably accurate to say that a large segment of the public perceives the success or failure of the criminal justice system as a direct result of the exercise of the sentencing function. Retaining a wide sentencing discretion particularly aids a system of conditional release, such as probation, which must have a broad base of public support.

Eliminating inquiry into the financial resources available to a defendant in an effort to ascertain if he is a good risk for probation will likely result in one of two

[20] Measures have been enacted in Georgia to curb abuse in the exercise of sentencing discretion; sentences of more than five years are reviewed for excessive harshness. Ga. Code Ann. § 27-2511.1 (1978 Rev.).

things, or a combination of both, and neither is desirable from the standpoint of public policy. One reaction was mentioned earlier; defendants who can demonstrate their probation-worthiness by putting up a financial stake that provides assurance that probation will be successful may now find themselves incarcerated. *Cf. Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring). The other reaction is that many judges will be hesitant about incarceration and take an increased risk on the success of probation. As the assurance of success has diminished, however, failures are likely to increase. As failures become more widespread the public perception of the system as an effective one will wane.

That the public has an acute interest in and awareness of the effectiveness of the criminal justice system cannot be denied. *Cf. Gregg v. Georgia*, 428 U.S. 153, 179-180 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325, 352-353 (1976) (White, J., dissenting). Especially is a conditional release system such as probation susceptible to the popular will when the system is viewed as ineffective.

There is no need to canvass the movements toward mandatory sentencing that are astir throughout the nation. In Georgia the movement has recently manifested itself in terms of two particular crimes, armed robbery and burglary. In 1976, the minimum penalty for armed robbery was increased from one year to five years; more importantly, in terms of this case, a proviso was added to preclude the suspension or probation of the sentence. Ga. Code Ann. § 26-1902(a), (b) (1977 Rev.). Only this year, a two-year minimum sentence was established for a second conviction of burglary and the sentence cannot

be suspended or probated. Ga. Laws 1978, p. 236.[21]

Maintaining public confidence in Georgia's Statewide Probation Act is one of the utmost importance if the state is to achieve another legitimate purpose—the rehabilitation and punishment of offenders outside the confines of a penitentiary.

D. Conclusion

As noted earlier, the petitioner concedes the validity of the statutes authorizing probated sentences conditioned upon the payment of a fine. *See* Ga. Code Ann. §§ 27-2529, 27-2709, 27-2901 (1978 Rev.). Her contention is simply that, as applied, they deny her the equal protection of the law.

We have shown, however, why in some circumstances it is necessary for a trial judge to assess the financial resources available to a defendant to assure that the defendant is a good risk for probation. Assessment of resource availability thus furthers the undeniably rational and legitimate state interest in vesting trial judges with a broad sentencing discretion. Assuring trial judges a broad sentencing discretion in turn promotes another rational and legitimate state interest—maintaining public confidence in the efficacy of a conditional release system.

As the relationship between any classifications drawn and the purpose for which they are drawn is clear and rational, under the traditional equal protection analysis applicable to this case (*see* Part II, *supra*), the Equal Protection Clause has not been offended. *Cf. Marshall v. United States*, 414 U.S. 417 (1974) (equal protection issue arising under Due Process Clause of Fifth Amendment).

[21] The statute became effective on July 1, 1978. For the present provisions pertaining to the permissible punishments for burglary, *see* Ga. Code Ann. § 26-1601 (1977 Rev.).

CONCLUSION

The judgment of the Supreme Court of Georgia should be affirmed.

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